



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Richard M. Esenberg, Esq.,
President and General Counsel,
Wisconsin Institute for Law & Liberty, Inc.
1139 E. Knapp Street
Milwaukee, WI 53202-2828

JUL - 5 2016

RE: MUR 6829

Dear Mr. Esenberg:

On May 28, 2014, the Federal Election Commission notified Wisconsin Institute for Law & Liberty, Inc. ("WILL") of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("Act"). On July 16, 2014 and December 1, 2014, the Commission notified WILL of two amendments to the complaint. On June 28, 2016, the Commission found that there is no reason to believe that WILL violated the Act and Commission regulations. Accordingly, the Commission closed the file in this matter on June 28, 2016.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66,132 (Dec. 14, 2009). The Factual and Legal Analysis, which explains the Commission's finding, is enclosed for your information.

If you have any questions, please contact Ruth Heilizer, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

Daniel A. Petalas
Acting General Counsel

BY: Jeff S. Jordan
Assistant General Counsel
Complaints Examination and
Legal Administration

Enclosure:
Factual and Legal Analysis

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Ron Johnson for Senate Inc.

MUR 6829

and James J. Malczewski as treasurer

Senator Ronald H. Johnson

Strategy PAC and James J. Malczewski as treasurer

Wisconsin Institute for Law and Liberty

I. INTRODUCTION

This matter was generated by a Complaint filed by Scot Ross ("Complainant"), Executive Director of One Wisconsin Now, on May 22, 2014, alleging violations of the Federal Election Campaign Act of 1971, as amended (the "Act") and Commission regulations by Respondents Ron Johnson for Senate Inc. and James J. Malczewski in his official capacity as treasurer (collectively the "Committee"), Senator Ronald H. Johnson ("Senator Johnson"), Strategy PAC and James J. Malczewski in his official capacity as treasurer ("Strategy PAC"), Wisconsin Institute for Law and Liberty ("WILL"). It was scored as a relatively low-rated matter under the Enforcement Priority System, a system by which the Commission uses formal scoring criteria as a basis to allocate its resources and decide which matters to pursue.

II. FACTUAL AND LEGAL ANALYSIS

Complainant alleges that the Committee failed to timely disclose debts incurred for legal fees related to a suit¹ filed by Senator Johnson against the Office of Personnel Management ("OPM") challenging an agency ruling related to the Affordable Care Act.² The Complainant

¹ The Complainant does not allege a violation of 52 U.S.C. § 30114(b) ("personal use").

² The U.S. District Court for the Eastern District of Wisconsin granted OPM's motion to dismiss the suit for lack of standing, and the Seventh Circuit Court of Appeals affirmed the lower court's decision. *Johnson v. U.S. Office of Personnel Management*, 2014 WL 1681691 (E.D. Wis. Apr. 28, 2014), *aff'd*, 783 F.3d 655 (7th Cir. 2015).

1 also filed two addenda related to the same issue.³ Compl. at 1. According to news articles
2 submitted with the complaint, Senator Johnson announced the lawsuit at a press conference on
3 January 6, 2014, and stated that legal fees for the suit would be paid to WILL, which was
4 representing him in the suit, from Committee funds. Compl. at 1-2; *see also id.*, Attach. at 1.

5 A joint response filed by Senator Johnson and his Committee asserts that the Committee
6 was not required to report the legal fees because the debt was not incurred for an expenditure, as
7 defined by the Act and Commission regulations. Joint Resp. at 1-2. The Joint Response asserts
8 that expenditures are defined as payments made for the purpose of “influencing any election for
9 Federal office,” *see* 11 C.F.R. § 100.111(a),⁴ and explains that, pursuant to the Commission’s
10 guidance in Advisory Op. 1986-09 (Daniel)⁵ and 11 C.F.R. § 104.3(b)(2)(vi), the payments to
11 WILL were reported on Line 21 of the Detailed Summary Page for the Committee’s 2014 July
12 Quarterly Report as “other disbursements.”⁶ *Id.* According to the Joint Response, the invoice

³ The first includes what appears to be a copy of WILL’s 2013 tax return (“Form 990”). First Compl. Addendum at 4-6. WILL’s Form 990 discloses \$10,770 in fees earned in 2013 in connection with Senator Johnson’s lawsuit against OPM, although according to the Form 990, the fees were not collected until 2014. *Id.* at 5. In the second Addendum, the Complainant notes that the Committee’s 2014 October Quarterly Report discloses a \$12,281.31 disbursement to WILL, and questions whether WILL was being paid the fair market value for services rendered in connection with an appeal it filed on September 1, 2014, in relation to the suit at issue. Second Compl. Addendum at 2. As the record reflects that the Committee ultimately paid WILL approximately \$84,626, *see* n.6, this Office does not address the allegation further.

⁴ As the Joint Response points out, Senator Johnson, who was elected to the Senate in 2010, was not on the ballot in 2014. *Id.* at 1. It is noted, however, on May 20, 2011, the Reports Analysis Division (“RAD”) notified the Senator that his campaign committee appeared to have “received contributions and/or made expenditures in support of [his] 2016 candidacy in excess of \$5,000.” RAD stated that Senator Johnson could disavow these activities on behalf of his 2016 candidacy by sending a written notification to RAD within 35 days, pursuant to 11 C.F.R. § 100.3(a). The Commission’s website discloses no disavowal notice from Senator Johnson.

⁵ In Advisory Op. 1986-09, a member of Congress sought Commission guidance as to reimbursing himself with campaign funds for legal fees incurred in connection with an inquiry into his travel expenses by the House Committee on Standards of Official Conduct.

⁶ The Committee’s 2014 July Quarterly Report, filed on July 14, 2014, discloses a payment to WILL of approximately \$41,413 on June 11, 2014. *Id.* at 319. In addition to the payment of approximately \$12,281 referenced above, *see* 2014 October Quarterly Report at 331, the Committee disclosed a payment of approximately

1 was paid with Committee funds on June 11, 2014, within 28 days of receipt of the invoice, and
2 accurately reported within the July Quarterly reporting period. *Id.*

3 WILL's Response explains that in its agreement with the Committee, it provided an
4 estimate of legal fees and stated that WILL would not exceed the estimate without consulting
5 with the Committee. WILL Resp. WILL also states that it did not require a retainer from the
6 Committee and that its fees were based on negotiated hourly rates. *Id.* Both WILL and Strategy
7 PAC requested that they be dismissed as respondents because they were not involved with the
8 lawsuit. *Id.*, Strategy PAC Resp.⁷

9 The Act and Commission regulations require political committees to continuously report
10 the amount and nature of their outstanding debts until those debts are extinguished. 52 U.S.C.
11 § 30104(b)(8); 11 C.F.R. §§ 104.3(d), 104.11(a)-(b). This reporting requirement applies to
12 "estimated debts." 11 C.F.R. § 104.11(b). Debts or obligations of \$500 or less "shall be
13 reported as of the time payment is made or not later than 60 days after such obligation is
14 incurred, whichever comes first." 11 C.F.R. § 104.11(b).⁸ Once the exact amount is determined,
15 the political committee shall either amend the report(s) containing the estimate or indicate the
16 correct amount on the report for the reporting period in which such amount is determined. *Id.*
17 Section 104.11(b) states that a "debt" includes "a written contract, written promise, or written
18 agreement to make an expenditure," but it does not exclude other types of Committee debts.

\$26,325 on October 29, 2014, *see* 2014 Year End Report at 160, and \$4,607 on April 1, 2015, *see* amended 2015 April Quarterly Report at 1153, for a total of approximately \$84,626.

⁷ The Respondents replied to the Complaint Addenda by reiterating their earlier responses.

⁸ Debts or obligations over \$500 shall be disclosed "as of the date on which the debt or obligation is incurred," with the exception of recurring administrative expenses such as salary or rent, and if the exact amount is not known, the report shall state that the amount disclosed is an estimate. *Id.*

1 Cf. 11 C.F.R. § 116.10(a) (disputed debts must be reported when a creditor has provided
2 "something of value" to the political committee).

3 It appears that the Committee initiated an agreement for WILL's legal services as early as
4 2013, but failed to report these debts, or estimated debts, when incurred, despite the fact that
5 WILL reportedly provided the Committee with an estimate of expenses. However, the
6 Committee ultimately disclosed its payments to WILL. Under all the circumstances presented
7 here, the Commission exercises its prosecutorial discretion and dismisses the allegations as they
8 pertain to Ron Johnson for Senate Inc. and James J. Malczewski in his official capacity as
9 treasurer, pursuant to *Heckler v. Chaney*, 470 U.S. 821 (1985). Further, the Commission
10 reminds Ron Johnson for Senate Inc. and James J. Malczewski in his official capacity as
11 treasurer, of the obligation to report its debts when incurred, to continuously report the amount
12 and nature of its outstanding debts until those debts are extinguished, and to amend its disclosure
13 reports accordingly, pursuant to 52 U.S.C. § 30104(b)(8) and 11 C.F.R. §§ 104.3(d), 104.11,
14 including "estimated debts," *see* 11 C.F.R. § 104.11(b). The Commission also makes no reason
15 to believe findings as to Senator Ronald H. Johnson, Strategy PAC and James J. Malczewski in
16 his official capacity as treasurer, and Wisconsin Institute for Law and Liberty, as there is no
17 indication that they violated the Act and Commission regulations in this matter.